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C O N F I D E N T I A L SECTION 01 OF 04 COLOMBO 000920

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DEPARTMENT FOR SCA/INS
MCC FOR D NASSIRY AND E BURKE

E.O. 12958: DECL: 06/25/2017
TAGS: PGOV PREL PTER PHUM MOPS CE
SUBJECT: AMBITIOUS CHIEF JUSTICE BREAKS AWAY FROM PRESIDENT

REF: A. (A) COLOMBO 00824
 1B. (B) COLOMBO 00265
 1C. (C) COLOMBO 00152

Classified By: charge d'affairs James R. Moore, for reasons 1.4(b,d).

11. (C) SUMMARY: In a shift from regularly supporting the President in its rulings, the Supreme Court, headed by Chief Justice Sarath De Silva, made several decisions this month that the public widely hailed as justice served by a newly independent judiciary. Legal experts say, however, that while they are also pleased with the recent rulings, they are less the result of an improved judiciary, than a product of De Silva's political ambitions and new alliances. Earlier in the year, international organizations expressed concerns over De Silva's influence over the judiciary in annual reports and recommended inquiries into the allegations that De Silva unfairly manipulated decisions. Though he would like to, it is unlikely the President will be able to oust De Silva before he retires from the Court in 2009. Meanwhile, legal observers continue to worry about De Silva's potential impact on the judiciary and the peace process. End Summary

RECENT DECISIONS HAILED AS JUST AND INDEPENDENT

12. (C) The Supreme Court, headed by Chief Justice Sarath De Silva, has shifted over the past month from regularly supporting the President in its rulings to deciding against the Government on key issues. When former President Chandrika Kumaratunga appointed De Silva over more senior judges to sit as Chief Justice of the Supreme Court in 1999, the public criticized De Silva as a tool of the Kumaratunga administration. However, in 2005, De Silva ruled that Kumaratunga would have to step down from office one year earlier than expected, paving the way for then-Prime Minister Rajapaksa to run for President.

13. (C) After Rajapaksa won the Presidential election, De Silva continued to support him in significant court cases.

In 2005, De Silva's bench issued an injunction to keep police from further investigating the President's alleged misappropriation of tsunami funds. In March 2006 the Court ruled the investigation violated Rajapaksa's fundamental rights and ordered a United National Party (UNP) parliamentarian and two others to pay the President compensation for opening the investigation. In October 2006, De Silva ruled to de-merge the Tamil dominated North and East provinces, a politically sensitive and important decision for the President and the JVP (ref B).

¶4. (C) In the following cases this month, however, De Silva reversed this trend and ruled against the President in a string of popular decisions many hailed as brave and just in its protection of fundamental rights.

--June 8: The Supreme Court issued an interim order to prevent the Inspector General of Police from taking steps to evict Tamils from Colombo or prevent them from entering Colombo despite orders widely believed to have come from the Ministry of Defense (ref A). (Note: De Silva was not on the bench for this case but sources close to the Court told us De Silva was behind the decision. End Note)

--June 14: De Silva issued a stay against Government plans to sell nearly 25 percent of its shares in Sri Lanka Telecom to a Malaysian company. The Court also subpoenaed all Government documents related to the sale.

--June 18: De Silva granted Tiran Alles's petition to file a Violation of Fundamental Rights case against the Government

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for his arrest on May 30. Alles was arrested on charges of supporting terrorism after the President fired Alles's allies, Mangala Samaraweera and Sripathi Sooriyarachchi, from their ministerial posts. The Government also froze business accounts for Alles's two newspapers, which were critical of the President and his policies, forcing them to close. Observers of the case said the Government's actions were politically motivated.

--June 19: The Court permitted a prominent UNP member to file a Violation of Fundamental Rights case against the Government for bribery solicitation and harassment of his company, Sevanagala Sugar Industries.

DE SILVA'S MOTIVES POLITICAL, NOT JUDICIAL

¶4. (C) Legal insiders say that while they are pleased with the recent rulings, they are not necessarily the result of an improved judiciary, but rather, are born in part out of De Silva's political ambitions and alliances. Embassy contacts say De Silva has close ties to members of the Sinhalese nationalist Janatha Vimukthi Peramuna (JVP), who are increasingly displeased with the Rajapaksa administration and who back De Silva's recent decisions. Former Attorney General and De Silva colleague, Shibly Aziz, told us De Silva was "riding the wave" of JVP and Jathika Hela Urumaya (JHU) support. He cited the rapid fire manner in which the Court issued decisions in June designed to target the President and his Administration and win popularity with the public. Aziz explained that De Silva was playing to Buddhist sensitivities while portraying himself as a populist who is not anti-Tamil. Bhavani Fonseka, Senior Researcher at the Center for Policy Alternatives (CPA), claimed that De Silva made the politically savvy decision to stay the eviction of Tamils from Colombo in order to garner UNP and public support while still maintaining his allegiance to the JVP which expressed its disapproval of the evictions in a June 7 session of Parliament. Saliya Pieris, a prominent private attorney that tries Supreme Court cases, told us other judges privately say De Silva has gone as far as engineering cases he wants to adjudicate by inviting petitioners to file their case using

lawyers known to him.

DE SILVA COURTING UNP

¶5. (C) Fonseka told us De Silva has political ambitions and is making judicial decisions with the aim of earning popular support and additional political backing. She said De Silva, who would need the backing of a major political party to achieve his political ambitions, has "sent feelers" to the largest opposition party, the UNP. Aziz, a UNP member, said De Silva was certainly sending "signals" to the UNP. Both Aziz and Pieris thought De Silva may later reverse his previous decision that the UNP could not expel its party members who crossed over to the Government last winter (ref C). After an initial defeat at the Supreme Court, the UNP re-filed its case with the District Court who ruled the UNP could not expel members who crossed over without an official disciplinary inquiry to find the members in violation of party rules. Aziz said the UNP is currently conducting such an inquiry. If successful and upheld by the Supreme Court, a finding in the UNP's favor would mean those members who crossed over to the Government's coalition would lose their seats in Parliament and the President's slim majority would be in jeopardy. Nonetheless, Pieris thought it was likely De Silva gave SLFP members Sooriyarachchi and Samaraweera assurances that they would not lose their Parliament seats if they crossed over to the opposition as they did on June 19.

ONLY DE SILVA MATTERS

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¶6. (C) Aziz told us that never in the judiciary's history has there been a chief justice with such absolute control over the rest of the country's judges. Aziz and Pieris said De Silva is charismatic, cunning, and vindictive, as well as one of the great legal minds of Sri Lanka, making him the last person anybody wants to challenge. From the Supreme Court down to the Magistrate Courts, De Silva dominates. Although there are 11 other Supreme Court justices, the Chief Justice chooses which ones sit on a given bench (usually consisting of three judges per case). Aziz said De Silva picks the most compliant judges regardless of their seniority. Pieris told us that even when De Silva is not personally on the bench, the Supreme Court justices make decisions approved by De Silva. Pieris said the only Supreme Court justice who dares challenge De Silva, Dr. Shirani Bandaranayake who is second in seniority, has now been marginalized. Aziz and Pieris point to the small number of dissenting opinions written during De Silva's tenure as further evidence of his dominance.

¶7. (C) Pieris also said that De Silva uses punishments and rewards to get what he wants. Pieris claimed he disbars lawyers who criticize him and withholds career opportunities from his adversaries. Transparency International noted in its 2007 report on Sri Lanka: "Judges who do not tow the political line are warned, and if incorrigible, are dismissed on one pretext or another. Conversely, judges who are politically in line with the administration are shielded from disciplinary action despite evidence of corrupt practices, including bribe taking..." Although no one openly opposes him, Pieris said, judges at all levels privately say they are unhappy.

BAD NEWS FOR THE JUDICIARY, AND PERHAPS, PEACE

¶8. (C) Sri Lanka has reasonable legal provisions to safeguard judicial independence. The Constitution provides for a Constitutional Council that ratifies the President's nominations to the Supreme Court. However, the council lapsed in November 2005 and President Rajapaksa failed to appoint new members. The Government said it is waiting for

smaller political parties to nominate the last remaining member. Meanwhile, the President has unilaterally appointed two Supreme Court judges. Fonseka told us these appointments were made in consultation with De Silva and were more influenced by De Silva than the President.

¶9. (C) Before the recent Supreme Court decisions, international organizations highlighted their concern that Sri Lanka's judiciary was increasingly politicized and largely blamed De Silva. In a statement at the UN Human Rights Council's fifth session held in Geneva, Secretary General Nicholas Howen of the International Commission of Jurists (ICJ) expressed concern about the "constitutional paralysis that is damaging the independence of Sri Lanka's institutions, including the judiciary." In May 2007, the Asian Human Rights Commission (AHRC) issued a report outlining its "serious concerns" about Sri Lanka's judiciary.

The report focused on "power increasingly arbitrarily exercised by the Chief Justice" and recommended an independent inquiry into "outstanding questions of abuse of power on the part of Sri Lanka's Chief Justice." Likewise, Transparency International reported this year that "corruption is one outcome of Sri Lanka's cowed judiciary. The situation has worsened since 1999 when Sarath De Silva was appointed Chief Justice." The report also recommended an inquiry into allegations against De Silva.

¶10. (C) Aziz told us he feared the "rule of law was breaking

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down." Pieris said De Silva is potentially dangerous for the nation because he will be the ultimate reviewer of any negotiated peace settlement between the Liberation Tigers of Tamil Eelam (LTTE) and the GSL. Pieris said legal observers fear that De Silva would review any negotiated peace settlement not with objective judicial scrutiny, but rather, politically, as he did in the 2006 North and East de-merger case. The AHRC said in its 2007 report, "The constitutionality of any political proposals concerning the ongoing conflict between the Government of Sri Lanka and the LTTE has ultimately to be taken before the Supreme Court. In the context of the current undermining of the independence of the Court, the ultimate fate of these proposals remain in the pale of political decision making and not in the sphere of objective judicial scrutiny."

PRESIDENT'S HANDS ARE TIED

¶11. (C) Thus far, President Rajapaksa has remained publicly silent on De Silva and his recent rulings, but there is little doubt he is unhappy with the Chief Justice. Supreme Court Justice Jagath Balapatabandhi (strictly protect) told our political FSN that, in mid-May, President Rajapaksa privately asked De Silva to retire. He said the President identified Supreme Court Justice Nihal Jayasinghe as his desired replacement. Pieris told us Jayasinghe is the fourth most senior on the bench and known as more pliable than De Silva. If De Silva does not voluntarily retire, the President would have to convince Parliament to impeach De Silva to put his man in the Chief Justice's seat, which is unlikely given De Silva's current level of public support. De Silva retires in 2009. In the meantime, President Rajapaksa consistently appoints Jayasinghe over the more senior Shirani Bandaranayake as acting chief justice when De Silva is away.

¶12. (C) COMMENT: The public widely hailed the Supreme Court's recent decisions as an independent stand against the Government to protect the rights of people and punish corruption. It appears, however, these cases were not decided entirely on their merits and, in at least in several instances, stem from the political ambitions of a charismatic and powerful chief justice. The Court may be independent, but does not appear to be fully objective. De Silva's recent decisions against the President tracks closely with the

President's declining support within his governing coalition and mounting international criticism of his administration. In the absence of any forceful persuasion by the President or a resurgence in the President's popularity, De Silva can be expected to continue to decide future cases according to what he thinks will win him the most political mileage and popular support.

MOORE